Supreme Court of Indiana.

SPITLER, ADMINISTRATOR, *v.* JAMES ET AL.

LUELLEN *v.* HARE.

When one in the course of business entrusts another with the form of a bill, check, or note, duly signed or endorsed by himself, but in blank as to any or all of the material parts, of date, amount, time or place of payment or name of payee, the law will presume that he authorizes that other to fill up the blanks consistently with the tenor and effect of the form.

If he limits the authority of that other by special instructions, and his instructions are disregarded, and the paper is completed in a manner not contemplated by him, he will not be answerable to the wrong-doer on the terms of the instrument, nor to any one taking the same with notice of the wrong; but he will be held liable to a *bona fide* purchaser.

A *bona fide* purchaser is one who for full value, obtains from the apparent owner a transfer of negotiable paper before it matures, and who has no notice of any equities between the original parties, or of any defect in the title of the presumptive owner.

THE first of the above named cases was an action against the appellant as administrator of G. W. Spitler, by the appellees, as holders, on a promissory note in the following form;

$1,739, 8-100. LAPORTE, July 20, 1860.

"Twenty months after date, we promise to pay to the order of G. W. Spitler, at the Bank of the State of Indiana, at the Laporte branch, seventeen hundred and thirty-nine 8-100 dollars for value received, without any relief whatever from valuation, appraisement or stay laws, with interest.

IRWIN & HOPKINS."

Endorsed: "Pay to the order of John Eason and D. S Eason, who compose the firm of J. and D. S. Eason.

GEORGE W. SPITLER."

"Pay to the order of James, Kent, Santee & Co.

JOHN EASON,
D. S. EASON."

"Late firm of J. & D. S. Eason, in liquidation."

The complainant alleged the transfer of the note by indorsement to the appellees for a valuable consideration, and before due, and in the ordinary course of business, and its protest for non-payment.

Appellent answered that when the said George W. Spitler endorsed the paper in suit, it was simply a printed blank form, as follows: "after date ——— promise to pay to the order of ——————— for value received, without any relief whatever from valuation or appraisement laws." That the decedent, at

the request of the makers, and for their accommodation, placed his name on the back of said paper; that he was informed that the paper was to be passed to John Eason in part payment for a stock of goods, and that he stipulated that the note, when filled, "should not be made payable at a bank"; that afterward said note was filled up, as it now appears, and delivered to said John Eason, the words, "At the Bank of the State of Indiana, at the Laporte branch," being inserted at the special request of said John Eason, though at the time of said insertion, and at the time of the delivery of said note, said John Eason was informed of the stipulation aforesaid made by said decedent, but notwithstanding such information, insisted upon and procured said words, "at the Bank of the State of Indiana, at the Laporte branch," to be inserted in said note, which was done without the knowledge or consent of said decedent.

A demurrer to this answer was sustained by the court below, and was the subject of this writ of error.

The opinion of the court was delivered by

RAY, J.—It will be observed that in this case we are not called upon to consider the effect of the alteration of a written instrument against the consent of a party to its execution. There was neither erasion nor interlineation, but the fact that the maker, whom the endorser entrusted with the right to fill certain blanks in the paper, fixing the amount, the date, the time of payment and the payee, in disregard of his trust, "inserted" or included after the name of the payee in the blank space, a place where payable. What are the consequences of this breach of trust upon the paper in the hands of an innocent holder? In England, the endorser would, perhaps, be discharged, because the courts there now hold the maker not chargeable with a simple breach of trust, but guilty of forgery: *Awde* v. *Dixon*, 6 Exch. 869, *Rex* v. *Hart*, 1 Moo. C. C. 486; *Regina* v. *Wilson*, 1 Den. C. C. 284. But this is recent law in England, and has never been generally accepted as authority in this country: *Bank of Mo.* v. *Phillips*, 17 Mo. 29. *Russell* v. *Langstaffe*, Douglas 514, was a case where one Galley, having had frequent transactions with the plaintiff, a banker, and having overdrawn his account, was refused any further advance without an in-

dorser acceptable to the plaintiff. Upon this Galley applied to the defendant, and he indorsed his name on five copper-plate checks, made in the form of promissory notes, but in blank, no sum, date or time of payment being mentioned in the body of the notes. Galley afterward filled up the blanks for different sums and dates as he chose. The plaintiff knew that the notes were blank at the time of their indorsement. In a suit upon these five notes, Lord MANSFIELD said: "The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, 'Trust Galley for any amount, and I will be his security. It does not lie in his mouth to say the indorsements were not regular.'"

The case of *Awde* v. *Dixon* was where the defendant agreed to join his brother in making a promissory note for his accommodation provided R would also join. The defendant accordingly signed an instrument in the form of a promissory note, a blank being left for the name of the payee. R refused to join; and afterward the defendant's brother delivered the imperfect instrument to plaintiff for value, representing that he had authority to deal with it, and plaintiff's name was inserted as payee. The court admit the "position that a person who puts his name to a blank paper impliedly authorizes the filling of it up to the amount that the stamp will cover," but insist that the plaintiff could not recover, because the *prima facie* power to complete the instrument was coupled with a condition unknown to the plaintiff. In plain language, a party may clothe another with all the indicia of authority to complete an instrument to which he has attached his name in blank, and yet avoid liability on the ground that he had imposed secret instructions upon the agent limiting his apparent general power.

The peculiar practice at the English bar, which sustains suggestive interruptions from the bench, furnishes here an instance, a rare one we trust, in which the law comes from the counsel, the sophism from the court.

The counsel assert, "where a person intrusted with a negotiable instrument for a special purpose delivers it to another, the mere contravention of the trust will not prevent the latter from recovering, if a *bona fide* holder for value and without

notice." PARKE B. responds, "This is a false instrument." The fraternal faith that trusts a blank form duly signed to a brother's keeping, where such possession furnishes *prima facie* proof of a power to complete the instrument, may challenge our admiration for the confidence displayed; but that admiration would be chilled, were we told that it involved no hazard save to the stranger who trusted to the *prima facie* evidence of power this possession involved; that the brother whose confidence was betrayed was held harmless by the law, and the stranger who reposes no confidence, but acts upon what the law admits is *prima facie* evidence, must alone suffer.

But this doctrine of forgery, as applied to a plain case of fraud or breach of trust, was discussed by Chief Justice PARSONS in *Putnam et al.* v. *Sullivan et al.*, 4 Mass. 45, where it was held that when one indorsed a blank paper, with the intention that something should afterward be written, to which the name should apply as an endorsement, the writing of the wrong thing was not a forgery, but a breach of trust, and he who had reposed the confidence must suffer alone when it was violated and the rights of an innocent party involved. In that case the defendant, a merchant, had entrusted his clerk with his blank indorsements, and one, by false pretenses, obtained them from the clerk and used them, and it was decided that the filling of the blanks was not a forgery, nor was it such a fraud as would discharge the indorser against the indorsee, who had paid value for the paper, and the liability was placed upon the ground that where one of two innocent parties must suffer, the loss should be sustained by him who had given the confidence, and thus enabled the fraud to be perpetrated.

In *Orrick* v. *Colston*, 7 Grat. 189, it was held that a paper signed in blank, and indorsed in blank, may be filled up either as a common promissory note or a negotiable note; and the person who indorsed it in blank will be liable on his indorsement to a holder for value.

In *Michigan Insurance Company* v. *Leavenworth*, 30 Vt. 11, the rule was stated that a *bona fide* holder of a bill of exchange had the power implied to fill all the blanks in the bill. So it was held in *Mechanics' and Farmers' Bank* v. *Schuyler et al.*,

7 Cow. 337, that in the hands of a *bona fide* endorsee, the endorser cannot question the transaction, though the blanks may have been filled in a manner entirely different from the understanding and expectation of the indorser when he put his name upon the note.

In *Fullerton* v. *Sturges*, 4 Ohio St. 529, where T, and others, sureties for C, signed an instrument payable to S, or order, in blank as to date, amount and time of payment, but with a private agreement that it should not be filled for more than $1,000 or $1,500, and delivered it to C., the principal, to procure the discount, and the instrument was presented by C, to S, the payee, and filled up for the sum of $10,000, it was declared that one who intrusts his name in blank to another to procure a discount, is liable to the full extent to which such other may see fit to bind him, where the paper is taken in good faith without notice, actual or constructive, that the authority given has been exceeded; that such blank signature has the effect of a general letter of credit, and the rule is founded as well upon the principle of general jurisprudence, which casts the loss, when one of two innocent persons must suffer, upon him who has put it in the power of another to do the injury, as also upon the rule of the law of agency, which makes the principal liable for the acts of his agent, in violation of his private instructions, when he has held the agent out as possessing more enlarged authority. This case was approved in *Holland* v. *Hatch*, 15 Ohio St. 464. PARSONS says of this *prima facie* evidence of authority to fill the blanks, that as between the immediate parties and all others who have notice of any limitation in the authority, this presumption may be rebutted, but as to *bona fide* purchasers without notice, it is conclusive: Bills and Notes, vol. 1, p. 109. To the same effect is Edwards on Bills 92, et seq.

Upon the question of what constitutes a *bona fide* holder, the law seems now well settled. In *Belmont Branch Bank* v. *Hoge*, 35 New York 65, it is declared that one who for full value obtains form the apparent owner a transfer of negotiable paper before it matures, and who has no notice of any equities between the original parties, or of any defect in the title of the presumptive owner, is to be deemed a *bona fide* holder. He does

not owe to the party who puts such paper in circulation the duty of active inquiry to avert the imputation of bad faith The rights of the holder are to be determined by the simple test of honesty and good faith, and not by mere speculation as to his probable diligence or negligence.

The case of *Holland* v. *Hatch*, 11 Ind. 497, is not in conflict with the authorities we have cited. It is there stated "that all blanks may be filled which are necessary or proper to make the instrument a perfect and complete bill of exchange, or promissory note as the case may be." It is denied that the addition of the words "without relief from valuation or appraisement laws" were necessary or proper to complete the bill their addition is held to avoid the instrument. This case was questioned in *Holland* v. *Hatch*, 15 Ohio St. 464, so far as it held the bill void by reason of the additional stipulation.

In this case it was proper to complete the note and render it negotiable by the law-merchant, to make it payable at a bank. There was sufficient space for that purpose, and whatever question there may have been, while the note remained in the hands of a party having notice of the limitation on the authority of the maker imposed by the indorser, no defense can be based upon such limitation when the paper has passed into the hands of a *bona fide* holder.

The principle which excludes defenses against instruments negotiable by the law-merchant, in the hands of a purchaser before due, for value and without notice of defects, would be violated by every exception introduced, and the value of such securities greatly lessened in the market.

The sole question which should present itself to one receiving such paper in the regular course of business is, whether the signatures are genuine and the paper unaltered. It is doubtless often convenient to indorse such instruments in blank and deliver the paper to the maker; but the act gives authority to the holder to fill the blanks in conformity to the general character of the paper, and involves confidence in the integrity of the person to whom the general authority is given. If, in violation of such trust, there be written within such blanks any stipulation, usual to paper of the class indicated by the blank

form, a *bona fide* holder will be protected. It is not to be supposed that a court, which has rigidly enforced the liability of a surety under circumstances involving the same principle in the case of an official bond, should hesitate in its application to a negotiable note.

We have held that where the obligee accepts an instrument, perfect in form and execution, which comes to him from the person who should have possession of the instrument for the purpose of such delivery, that the obligee may accept it without further inquiry. The entire transaction, so far as the obligee is involved, is according to the ordinary and natural course. The surety, however, while he executes the instrument and places it in the usual channel for delivery, departs from the ordinary course of procedure by circumscribing the general authority by a condition unknown to the obligee. The condition is disregarded, a fraud is accomplished and he who has not scrupled to trust his principal with the semblance of a general authority to make the delivery, must stand the hazard he has incurred: *The State ex rel* v. *Pepper*, 31 Ind. 70. See also *Deardoff* v. *Forseman* 5 Am. Law Reg., N. S., 539; S. C. 24 Ind. 481, where the rule was applied to a note negotiable under the statute.

It appears by the complaint and answer that the note was endorsed in a blank form, and without alteration, erasure or interlineation, was filled up as a note negotiable by the law-merchant, and in that condition was, before due, and in the ordinary course of business, for value transferred to the plaintiff. The act of the decedent enabled the maker to put the paper in this condition into the market, and the consequences must rest upon the estate. The demurrer was properly sustained.

The judgment affirmed.

LUELLEN ET AL *v.* HARE.[1]

THIS was an action by the appellee upon a promissory note in the following form:

"Exchange for $1,000. INDIANAPOLIS, IND., Jan. 22, 1866.
"On or before the first day of May next we pay to the order of M. L. Hare,

[1] See preceding case, p. 605.

one thousand dollars, at the Indianapolis Branch Bank, for value received, without any relief whatever from valuation or appraisement laws of the State of Indiana.

AUGUSTUS WEAVER,
BENJAMIN LUELLEN,
WILLIAM HANCOCK."

Luellen and Hancock answered, denying the execution of the instrument. The answer was sworn to. Weaver was defaulted. The jury found a general verdict for the appellee. They also returned special answers to interrogatories as follows:

1. Was the note sued or delivered to the defendant Weaver at his request, and for his accommodation, in the following form, to wit:

"Exchange for $1,000. KOKOMO, IND.,———186
"Pay to the order of ——————————Dollars, at ——————— Value received, without any relief whatever from valuation or appraisement laws of the State of Indiana.

To———— BENJAMIN LUELLEN,
———— WILLIAM HANCOCK."

Answer—It was.

2. Did the plaintiff fill up the blank referred to in the first interrogatory in the form in which it now appears?

Answer—He did.

3. Did the defendants, Luellen and Hancock, have any knowledge of or consent to the filling up of said blank by plaintiff?

Answer—They did not.

The appellant moved for judgment on the special finding in disregard of the general verdict. The motion was overruled and judgment entered for the appellee.

The opinion of the court was delivered by

RAY, J.—In *Spitler, Ad.* v. *James et al.*, at this term (*ante* p. 605) we held that when one affixed his signature to a blank form he *prima facie* authorized the instrument to be filled as such forms are usually completed. That if the form was that of a promissory note, it might be filled either as a note recognized by our statute or by the common law, there being no special indications

restricting it to either class, and that being so perfected, when in the hands of a *bona fide* holder, this *prima facie* presumption of authority could not be questioned.

The issue here presented is the converse of the one there discussed. Can the party receiving such a blank form fill it up in a manner different from its tenor and legal effect?

Here the form was a bill of exchange, signed by the appellants as drawers and requesting the person to whom it should be addressed to pay to the order of —— $——, at ——.

This authorized the holder to fill the blank address, the date, amount and the place where payable. The intent of the drawers was to assume a liability secondary to the party who should become the acceptor. As the form was filled, it imposed a primary liability upon the appellants and one clearly not contemplated when they executed the instrument. There can be no question that the writing of words calculated to change the legal effect of other words already written, is to all intent as fully an alteration of the instrument, as an erasure and substitution would be. Such alteration, of course, discharges the surety or maker where, as in this case, it is done without his consent, and the paper remains within the hands of the party chargeable with the alteration.

Judgment reversed and cause remanded, with directions to the court below to enter judgment for the appellants.

1. The decision of the Court of King's Bench, in *Russell* v. *Langstaffe*, Doug. 514, is still the law of England, and has been affirmed in every State in this country in which the question has been passed upon. The general doctrine is, that if A signs his name as maker or endorser upon a blank bill, check, or note, and delivers the same to B he authorizes B to complete the instrument; and a *bona fide* holder, for value and without notice, may recover from A on the same, even although in completing it B has exceeded his authority and bound his principle in a manner consistently with its tenor, but not contemplated, or even expressly prohibited by him.

As in the act of delivery he has constituted B his agent to control the paper, a stranger may properly assume that B is authorized to issue it, from the sufficient fact of his having it within his control; and, inasmuch as by the commercial law such a document is of the nature of a letter of credit, without reserve, to all the

world, if the stranger takes it for value, and without notice of the restriction upon B's authority, it is as if he took it direct from A in the course of commerce; the burden of successfully impeaching it rests upon the latter, and in a suit thereon he cannot deny that it is his merely because it is not exactly what he privately intended it to be. The law can presume no other intent than such as is clearly deducible from the transaction in the aspect in which it is presented to the public, and the apparent authority is regarded as the real authority, no matter what is their actual difference. In supporting a defense A must necessarily admit his signature as his deed, and as he is thereby estopped from averring that the instrument as proffered was not complete when he executed it, so he cannot, of course, allege a material alteration in the paper after it was made, and he is accordingly without ground to stand upon: *Violett* v. *Patton*, 5 Cr. 142. But waiving for a moment the principle of estoppel which confronts him at the outset, and assuming his case not to be one of the exceptional class, hereafter noted, in which the liability is incurred by negligence in not effectually preventing or stopping the circulation of a bill, it will be seen that, besides the signature, he must also admit his intent to issue paper, and the delegation of authority to perfect that intent. If then, going thus far, he denies that his agent has carried out his intent in manner and form as instructed, he should show that the special mode prescribed by him was public as the authority given, or, at all events, he should bring the former home to the notice of the purchaser, to sustain a valid defense as against him. Otherwise he may raise an issue between himself and his agent as to whether there was or was not such restriction (which the latter may deny), but the presumption of a general authority which he has himself created, and which in its legal operation has been in no manner qualified will not be rebutted by the decision of the issue, one way or the other. And this, because, under the circumstances, the law will not permit a principal to defend on the ground that, although publicly he authorized his agent to act for him in a general way, privately he did not, but limited his authority.

II. It has been recently suggested that perhaps the obligation created by blank makings and endorsements depends on the principles of estoppel, and not on any peculiarity of negotiable paper, and the force of the suggestion will be seen in the foregoing remarks; but probably the principles applicable are referable to the law of agency which seems to offer the firmer ground for them. The doctrine of general jurisprudence, that where one of two innocent parties must suffer, he should bear the loss whose act has caused the injury, has also been generally relied upon in the cases, and in some of them has ruled the decision: *Ingham* v. *Primrose*, 7 C. B. 82; S. C., 28 L. J. C. P. 295.

III. The paper at delivery may be entirely blank above the signature, or in the form of an ordinary printed bill or note, with the material parts in blank, and the spaces may be filled in with any date, time of payment, amount, place of payment, or payee, provided this be done consistently with the legal import or tenor of the form signed or endorsed: *Orrick* v. *Colston*, 7 Grat. 189; *Putnam* v. *Sullivan*, 4 Mass. 45; *Bank* v. *Schuyler*,

and *Mitchell* v. *Culver*, 7 Cow. 337; *Douglas* v. *Scott*, 8 Leigh. 43; *Fullerton* v. *Sturges*, 4 Ohio N. S. 529; *Johnson* v. *Bladsdale*, 1 S. & M. 11; *Bank* v. *Curry*, 2 Dana 143; *Huntingdon et al.* v. *The Bank*, 3 Alab. 186; *Violett* v. *Patton*, 5 Cr. 142; *Holland* v. *Hatch*, 15 Ohio N. S. 464; *Torry* v. *Fisk*, 10 S. & M. 590; *Norwich Bank* v. *Hyde*, 13 Conn. 279; *Robertson* v. *Smith*, 18 Alab. 220; *Moody* v. *Therekeld*, 13 Geo. 155; *Ives* v. *The Bank*, 2 Allen 236; *Collis* v. *Emmett*, 1 H. Bl. 313; *Smith* v. *Mangay*, 1 M. & S. 96; *Cruchley* v. *Clarence*, 2 M & S. 90; *Montague* v. *Perkins*, 22 E. C. L. R. 516; *Schultz* v. *Astley*, 2 Scott 815; *Awde* v. *Dixon*, 6 Excheq. 869; 1 Bell's Comms. Laws of Scotland 390; *Visher* v. *Webster*, 8 Cal. 112; *McArthur* v. *McLeod*, 6 Jones' Law, 475.

IV. An instrument with an inconsistency or irregularity patent upon its face should put a purchaser on his guard, and if he chooses to take the risk implied, in the course of business, and for value, he cannot claim the protection afforded him who holds a note with no apparent defect; *Crosby* v. *Grant*, 36 N. H. 273; *Goodman* v. *Symonds*, 20 How. 343; *York Ins. Co.* v. *Brooks*, 3 Am. Law Reg., N. S., 402; *Mehaiwe Bank* v. *Douglas* 31 Conn. 170. If, therefore, the agent fills in the blank, in such a manner as to create a questionable appearance, one should make inquiry ere he rely upon it. Such would be the case of a bill drawn in England for an amount larger than that covered by the stamp; for there, as the stamp is in the paper, the irregularity would be patent; although in America, where the stamps are attached, the illustration would not be complete, and the decision would probably be the other way: Byles on Bills, 5 Amer. Edit. 282, 307—such would have been the principle upon which an innocent holder for value, would have been defeated in *Luellen* v. *Hare*, if defeated at all; and such was the ground of the judgment in *Awde* v. *Dixon*, 6 Excheq. 869. In that case the defendant agreed to join his brother in making a promissory note for the accommodation of the latter, provided one R would also join; and he signed the instrument thus, "—Decem., 1848, "On demand we do hereby jointly "and severally promise to pay to "Mr.————, or order, 100*l.* as wit "ness our hands ———— William "Dixon." Such a document, being a joint and several engagement executed by one party, was certainly incomplete; and it was on this ground that PARKE, B., distinguished the case, and the court held that the defendant should have judgment. On the other hand although in *Merriam* v. *Rockwood*, 4 N. H. 81, the arrangement between the principal and agent was of a similar character, inasmuch as there was nothing to put the plaintiff upon his guard, it was held that he might recover. There a surety signed a negotiable note and delivered it to the person he intended to accommodate, upon condition that it should not be delivered to the payee or negotiated elsewhere, until some other person should also sign it as surety, but, inasmuch as there was nothing on the face of the paper indicating that any other was expected to become a party thereto, and no fact was brought to the knowledge of the payee, calculated to suggest inquiry, the defense could not avail: *The Bank* v. *Goss*. 31 Vt. 315; *Pickering* v. *Burk*, 15 East. 38; *Dixon* v. *Dixon*, 3 Vt. 450; *Haskins* v. *Lombard*, 16 Maine, 140; *Smith*

v. *Moberly*, 10 B. Monr. 266; *Dearstoff* v. *Foresman*, 5 Am. Law Reg., N. S., 539; S. C. 24 Ind. 481.

V. The authority implied from the making of a blank instrument for accommodation, being merely in the nature of a naked power not coupled with an interest (*Smith's Execs.* v. *Wyckoff*, 3 Sandf. Ch. 77), is revocable as long as delivery is not technically perfect, and the principal retains the control of the instrument, either in his own or in his agent's hands. Thus, if he signs a bill in blank, and it is stolen from him, the better opinion is, that unless negligence be shown, he will not be liable to any subsequent holder for value, without notice of the theft, for here there is no delivery; although there are some dicta the other way: *Montague* v. *Perkins* 22 L. J. C. P. 189; *Ingham* v. *Primrose*, 28 L. J. C. P. 295; Byles on Bills, 187 Eng. Edit. of 1870. If, again, he actually delivers the note to his agent, he may subsequently withdraw it, provided there is still the naked power between them, not made anything more by the creation of a consideration, meritorious or valuable. Such an instance of a mere bailment is rare. But until a note, though complete, is *issued*, it "has no legal vitality or existence:" (Asst. V. C., 3 Sandf., ch. 77): *Marvin* v. *McCullum*, 20 Johns. 288. At that moment, however, rights of others have vested, and there is no power of revocation, even as between the principal and his agent; In a contest between whom the former is bound by his contract, whatever it be, if legal, although, as in *Luellen* v. *Hare*, he cannot be held to anything more. But if there is no revocation, the authority of the agent continues up to the time of the issue of the note by him; and as the exercise of that authority rests in his discretion, he may, whilst still controlling the paper, revoke one filling up, and make another. This would not be the case of an alteration after making, which, if material, would avoid the note: *Douglas* v. *Scott*, 8 Leigh 43; *Downes* v. *Richardson*, 5 B. & Ald. 674; *Abraham* v. *Skinner*, 12 Ad. & E. 763; *Pasmore* v. *North*, 13 East 517; *Cox* v. *Troy*, 5 B. & Ald. 474. Potheir, Traité du Contrat De Change, d. 44, p. 1, ch. 3, s. 3.

VI. And finally, as the delegated power may be thus revoked by the grantor as long as it remains merely a naked power, and the note is not legally delivered, so it is revoked by his death; and, if the paper has not been started on its course by that event, the agent's authority is gone, and the estate of the decedent cannot be held responsible on its subsequent issue. And this is the law, whether the *bona fide* purchaser for value has notice of the death or not: *Smith's Execs.* v. *Wyckoff*, 3 Sandf., ch. 77; *Michigan Ins. Co.* v. *Leavenworth*, 30 Vt. 12.

VII. But such a revocation, if undertaken by the principal himself, must be effectual; and, accordingly, if, through any negligence of his own, a note which after issue he intended to cancel, or before issue to retain, be not retained or destroyed, but subsequently comes into the hands of a *bona fide* holder for value, he will be liable. This would be the case if he was to crumple the paper into a ball and throw it into a waste basket, from which it was taken entire, but without his knowledge, by a clerk, and put into circulation: See the case of *Ingham* v. *Primrose*, 7 C. B. 82, where a bill was ineffectually torn in two pieces. In this connection a man might deny

his intent to issue a note (*vide ante*), and set up that he had revoked his agent's authority, but he could not thus meet the new liability which he has incurred by his own negligence independently of any prior circumstances.

VIII. In Indiana the statute of Anne is not in force, and a legislative enactment has placed promissory notes on the same footing with inland bills of exchange by the law-merchant, *if payable at a chartered bank within the State:* Rev. Stat., 1838, 1 Blackf. 14. 81. Hence the remark in *Spiller* v. *James*, that "it was proper to *complete* the note and render it negotiable by the law-merchant, to make it payable at a bank." In that case, accordingly the defendant was held bound by an act which made the paper negotiable contrary to his express instructions, and so materially affected his liability. This was fully warranted by the authorities. It rested with the agent to fill up the paper according to the common law, or to the statute of his State, as it did in *Orrick* v. *Colston*, 7 Grat. 189, in Virginia, where the statute of Anne likewise was not in force, and the word "assigns" was used.

IX. If a holder for value is to be affected by notice, it must be such as has been indicated as upon the face of the instrument itself, or a notice of the limitation of the authority of the agent so as to render the holder. in the event of a breach of that authority a party thereto, when of course, he could no more profit by the wrong done than could the agent himself: *Hill* v. *Sweetzer*, 5 N. H. 168; *Bank* v. *Phillips*, 17 Mo. 29. Without such notice as this a stranger to the principal may fill up the instrument under the direction, express or implied, of the agent, and subsequently recover on it: Byles, Eng. edit., 1870, 187. This, when legally done, he would not do as agent of the agent, but by virtue of the authority inherent in the delivery to him of the principal's letter of credit, or engagement, which delivery, in the absence of fraud, the latter would be estopped from denying as his own. And it is clear that a *bona fide* endorsee cannot be defeated merely because he knew that the paper when endorsed by the defendant was in blank: *Mitchell* v. *Culver*, 7 Cow. 336; *Fullerton* v. *Sturges*, 4 Ohio, N. S., 529; *Huntington et al.* v. *The Bank*, 3 Ala. 186; *Schultz* v. *Astley*, 2 Scott 815. And it *seems* that if an agent in filling up a blank note exceeds his authority, and a third person receives the note with a knowledge that the authority was limited and has been transcended, the note will not be void *in toto*, but only for the excess beyond the sum which was authorized. It is not the case of a forgery, but of a breach of trust: *Johnson* v. *Blasdale*, 1 S. & M. 11; *Torry* v. *Fisk*, 10 S. & M. 590; 1 Cromp. & Jerv. Excheq. 316; *Goss* v. *Whitehead*, 33 Mississippi 213.

X. It will be borne in mind that the doctrine discussed relates to the making of bills or notes, and not to their alteration after they are made (as to which latter point, vide *Goodman* v. *Eastman*, 4 N. H. 455; *Worrall* v. *Gheen*, 39 Penna. St. R. 388; *Wood v. Steele*, 6 Wall. 80), and that there is a difference in law between what is technically known as an endorsement in blank, and the signing or endorsing of blank notes or bills, and although in the former instance a contract may, in some of the States, be written over the name, the legal principles applicable are not pertinent to the present inquiry. W. W. W.

Supreme Court of Errors of Connecticut.

SIMEON M. WALLING *v.* GEORGE POTTER.

A person receiving transient accommodation at an inn, for which he is charged by the innkeeper, is a guest and entitled to all the rights of a guest, although he be not actually a traveler.

ACTION on the case against the defendant as an innkeeper to recover money stolen from the plaintiff while a guest at the inn. The following facts were found by the Superior Court:

The plaintiff lost money at the defendant's inn, under such circumstances that he is entitled to recover therefor the sum of $60, if the relation of innkeeper and guest existed between the parties. The defendant it was admitted was an inn keeper. The plaintiff and defendant both resided in the town of Kent, and the inn was in Kent, about half a mile from the plaintiff's residence. The plaintiff came to the inn on an evening, staid there over night, and took breakfast there; and paid the defendant for his night's lodging and breakfast the usual charge for such entertainments.

The plaintiff claimed that on these facts he was a guest at the inn, and entitled to treat the defendant as an innkeeper and hold him responsible as such. The defendant claimed that the plaintiff was not a traveler or a wayfaring man, and not a guest at the inn so as to be authorized to charge the defendant as innkeeper for the loss claimed.

The question of law arising on the facts was reserved for the advice of this court.

Hubbard and *Andrews*, for the plaintiff, cited *Thompson* v. *Lacy*, 3 Barn. & Ald. 283; *Parker* v. *Flint*, 12 Mod. 255; *Peet* v. *McGraw*, 25 Wend. 653; 1 Parsons on Cont. 572, 610; Jones on Bailm. 35; 3 Bac. Abr., *Innkeeper*, *C.* 4; 2 Kent Com. 595; *Towson* v. *Havre de Grace Bank*, 6 Har. & J. 47; *Mason* v. *Thompson*, 9 Pick. 280; *Bennett* v. *Mellor*, 5 T. R. 273; *York* v. *Grindstone*, 1 Salk. 388; *Galley* v. *Clerk*, Cro. Jac. 188; *Beedle* v. *Morris*, Id. 224; *S. C.*, Yelv. 162; *Jones* v. *Osborn*, 2 Chitty 484.

O. S. Seymour and *Knapp*, for the defendant, cited 1 Swift Dig. 550; *Thompson* v. *Lacy*, 3 Barn. & Ald. 283; 2 Parsons on Cont., 5th ed. 150; *Berkshire Woolen Company* v. *Proctor*

7 Cush. 417; Story on Bailm., § 477; Dean's Commercial Law, § 481; 3 Bac. Abr., *Innkeeper, C.*, 5; *Calye's Case*, 8 Coke 32; *Grinnell* v. *Cook*, 3 Hill 485; Smith's Lead. Cas. 266; Jones on Bailm. 110.

The opinion of the court was delivered by

CARPENTER, J.—The plaintiff and defendant were residents of the same town. The defendant was an innkeeper, and the plaintiff took lodging and breakfast at his inn, paying therefor the usual charge for such entertainment. While at the defendant's inn the plaintiff lost a sum of money, and the court has found that he is entitled to recover the sum lost, provided the law is so that the relation of innkeeper and guest existed between the parties. Whether such relation existed or not is the question and the only question resolved.

An inn has been judicially defined as "a house where the traveler is furnished with everything which he has occasion for while on his way:" *Thompson* v. *Lacy*, 3 Barn. & Ald. 283. A guest is one who patronizes an inn as such. But it is said that none but a traveler can be a guest at an inn in a legal sense. We do not suppose that the court intended, in the definition above quoted, to lay stress upon the word traveler. It is used in a broad sense to designate those who patronize inns. In *Wintermute* v. *Clark*, 5 Sandf. 247, the court say, that in order to charge a party as an innkeeper, it is not necessary to prove that it was only for the reception of travelers that his house was kept open, it being sufficient to prove that all who came were received as guests without any previous agreement as to the time or terms of their stay. A public house of entertainment for all who choose to visit it, is the true definition of an inn. These definitions are really in harmony with each other. Webster defines a traveler as "one who travels in any way." Distance is not material. A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resides at the inn, his relation to the inn-keeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler and receives it as such, paying the customary rates,

we know of no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one. In short, any one away from home, receiving accommodations at an inn as a traveler is a guest, and entitled to hold the innkeeper responsible as such.

The Superior Court must be advised to render judgment for the plaintiff.

The New York Court of Appeals, in *Ingallsbee* v. *Wood*, 33 N. Y. 577, *Held*, that one who merely leaves his horse and carriage at the stables of an inn is not to be regarded as a guest; but the general rule is certainly otherwise; *York* v. *Grindstone*, 1 Salk. 388; S. C., 2 Ld. Ray. 866; Yelv. 67; Redfield on Bailments, § 587, and cases cited. The question is ably presented by WILDE, J., in *Mason* v. *Thompson*, 9 Pick. 280. It has never been regarded as important, in modern times, until this case in New York, that the guest should receive any personal refreshment in order to secure the protection of his horse and carriage, while lodged in the keeping of the innkeeper for refreshment and care for reward. Lord HOLT dissented from the opinion of the court, in *York* v. *Greenough*, 2 Ld. Ray 866; but his views seem not to have gained any acceptance until the decision in New York, which was by a divided court.

But the question, how far the guest must be really, and in truth, a "traveler" or "wayfaring man," seems not to have received much discussion in the courts. The early definitions seem to assume that the host is not obliged to receive any as guests, who are not travelers. In *Calye's case*, 8 Co. Rep. 32, it is said "it ought to be a common inne" for "passengers and not for neighbors." And in *Parkhurst* v. *Foster*, 1 Salk. 387, it was held that one taking lodgers to lodge and diet in his house, and letting stables for their horses is not an innkeeper.

But where the house is clearly an inn, and in the language of OAKLEY, Ch. J., in *Wintermute* v. *Clark*, 5 Sandf. S. C. 242, "a public house of entertainment for all who choose to visit it," the presumption certainly will be that one who takes lodging there, for a single night, is to be regarded as a guest, and especially so when he submits to the ordinary terms of other guests.

Where one lives in the same town, he cannot compel the innkeeper to receive him as a guest. But undoubtedly, by special agreement, the innkeeper may receive him as such; and if he do, cannot excuse himself from his ordinary responsibility by showing that his guest was not a traveler. He should insist upon his right not to receive him as a guest, or else, after agreeing to receive him as a guest, he must submit to the legally implied consequences growing out of the relation. And where the house is clearly an inn, and the person is received and entertained in the ordinary mode of entertaining guests, the legal implication must be that he is received as a guest, and he will be entitled to demand the protection which the law places around the property of guests at such places.

F. R.

Supreme Court of Ohio.

LITTLE MIAMI RAILROAD COMPANY *v.* WETMORE.

Where a passenger at a railroad depot, while having his baggage checked, got into an altercation with the baggage-master and was struck by him with a hatchet, the company were not liable for the injury.

THIS was an action in the court below, by defendant in error against the railroad company, to recover damages for injury occasioned by an assault, committed by one of the agents of the company, as averred, while he was acting within the scope of his employment.

The facts were, that Wetmore went with his baggage to the depot of the railroad company and requested the baggage-master, one Halpine, to check his baggage. Wetmore testified that Halpine replied he would "check it when he got ready" and continued checking other baggage which was arriving after that of witness. After waiting some time and making several requests to have his baggage checked, witness went around to the inside of the counter on which baggage was placed, and repeated his request; whereupon he was seized by Halpine and violently pushed out of the enclosure. Witness then came up again outside of the counter, and shaking his finger in Halpine's face, told him he should suffer for his conduct; whereupon Halpine took up a hatchet and struck witness on the head. Halpine testified, that when witness came up to him first he was getting checks for some other passengers who were there first; that Wetmore was importunate and came inside the enclosure and used abusive language; that he had merely taken him by the arm and led him out, and that Wetmore then came up with his hand under his coat, so that witness thought he was going to draw a weapon, and witness took up the hatchet and pushed him away with the end of it.

The jury found a verdict for plaintiff for $7,000, on which the court entered judgment. The case was now before this court on writ of error.

D. Thew Wright, for plaintiff in error, cited Smith on Master and Servant 183 (2d ed.); Story on Agency, § 452; *Croft* v. *Alison*, 4 B. & Ald. 590; *McManus* v. *Crickett*, 1 East, 67;

Cox v. *Kehey*, 36 Ala. 340; *Steamboat Ohio* v. *Stunt*, 10 O. St. 582; *Steamboat Messenger* v. *Pressler*, 13 O. St. 255; *Steamboat Ocean* v. *Marshall*, 11 O. St. 379; *Ellis* v. *Turner*, 8 D. & E. 533; *Foster* v. *Essex Bank*, 17 Mass. 509; *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheat. 326; *Crocker* v. *N. L. R. R. Co.*, 24 Conn. 249; *Vanderbilt* v. *Richmond Turnpike Co.*, 2 Conn. 479; *Wright* v. *Wilcox*, 19 Wend. 343; *Roe* v. *B. R. R. Co.*, 7 Eng. L. & E. 546; *Goff* v. *Great N. R. R. Co.*, 3 E. & E. 671; *E. C. R. R. Co.* v. *Brown*, 6 Exch. 314; *Poulten* v. *L. & N. R. R. Co.*, L. R. 2 Q. B. 534; *Mitchell* v. *Crosweller*, 13 C. B. 237; *Story* v. *Ashton*, L. R. 4 Q. B. 476; *Williams* v. *Jones*, 11 Jurist N. S., 843; *E. & C. R. R. Co.* v. *Baum*, 21 Ind. 70.

H. L. Burnett and *John F. Follet* for defendant in error, cited *Penn. R. R. Co.* v. *Vandiver*, 42 Pa. St. 371; *Joel* v. *Morrison*, 6 C. & P. 501; *Sleath* v. *Wilson*, 9 C. & P. 607; *Powell* v. *Deveney*, 3 Cush. 300; Redfield on Railways, sec. 130 (4 ed.); *Howe* v. *Newmarch*, 12 Allen 49; *Weed* v. *P. R. R. Co.*, 5 Duer 193; *Moore* v. *F. R. R. Co.*, 4 Gray 465; *Hewett* v. *Swift*, 3 Allen 420; *Meyer* v. *Second Av. R. R. Co.*, 8 Bosw. 305; *Seymour* v. *Greenwood*, 7 H. &. N. 355; *Koruh* v. *Ottawa*, 32 Ills. 121; *Chicago R. R. Co.* v. *McCarthy*, 20 Ills. 385; *Whatman* v. *Pearson*, L. R. 3 C. P. 422.

It is laid down by all modern text writers as well as by the overwhelming weight of the decisions, that the liability of the master can not, in any case, be made to depend either upon the *intention* of the servant, or the *authority* and *consent* of the master. The master has nothing to do, either way, with the purpose and intention of his servants. It is with their acts alone that he is to be affected, and if these are done while engaged in his employment, the master is liable, whether committed carelessly or purposely—willfully or maliciously, or without malice and intention—upon the authority of the master or without his consent and even in direct opposition to his express commands. The *act* of *the master* is the employment of the servant.

The only criterion in a case like this, is, whether the act was done while the servant was transacting the business of his

master. If this is once established by the determination of a jury, there is no loop-hole for the master to escape responsibility.

The opinion of the court was delivered by

WHITE, J.—There is no controversy as to the general rule by which the question of the liability of the railroad company for the act complained of in the petition, is to be determined. The difficulty arises in the application of the rule to the peculiar facts of the case.

Halpine, the person guilty of the wrong, as the servant of the company was charged with the duty of checking the baggage of passengers, and whatever liability, if any, devolved upon the company, for the consequences of his wrongful acts, grew out of the relation of master and servant, which existed between him and the company.

The general rule as to the liability of the master for the wrongful acts of his servant, is thus stated by Mr. Smith in his work on Master and Servant.

"A master is ordinarily liable to answer in a civil suit for the tortions or wrongful acts of his servant, if those acts are done in the course of his employment in his master's service. The maxims applicable to such cases being *respondent superior* and that before alluded to *qui facit per alium facit per se*. This rule, with some few exceptions, which will hereafter be pointed out, is of universal application, whether the act of the servant be one of omission or commission, whether negligent, fraudulent or deceitful, or even if it be an act of positive malfeasance or misconduct, *if it be done in the course of his employment*, his master is responsible for it *civiliter* to third persons:" Smith, M. & S., 151.

But to make the master responsible, the act of the servant must be done in the course of his employment, that is, under the express or implied authority of the master. Beyond the scope of his employment, the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master: *Id.*, 160; Sher. & Redf. on Neg., §§ 55, 59, 62; *Simpson* v. *London*

Gen'l Omnibus Co., 1 Hurl. & Colt. 541; *Poulten* v. *London & South-western R. Co.*, L. R., 2 Q. B. 535.

That there was in this case no express authority given to the servant is conceded. Can such authority be implied under the circumstances of the case, under the nature of the business entrusted to his charge? The company contends that it cannot; and the tenth instruction was asked on the ground that there was no evidence to show such authority. For the plaintiff below, it is insisted that the servant was impliedly invested with such powers as were essential to the regular and certain performance of his duties; that for the dispatch of his business in certain emergencies, he must be considered as authorized to suppress by force, if necessary, any interference with, or obstruction of the quick and certain discharge of his duties. Without undertaking to lay down a general rule to govern all cases, it may safely be admitted that the servant is invested with authority to use the necessary means to the performance of the duties assigned him, and that the character of the means that may be used will vary according to the nature of the duty to be performed and the attending circumstances. But in looking at the evidence it is to be noticed that the assault complained of was not committed in endeavoring to eject the plaintiff from the space inclosed by the tables, over which the servant may be supposed to have had a special control. The plaintiff, according to his own statement, had gone outside of the tables and was shaking his finger in Halpine's face, and addressing him with an opprobrious epithet. It seems to us the assault was in no way calculated to facilitate or promote the business for which the servant was employed by the master, nor could it have been supposed to be, or intended as an act done with that view or object. It is not a case of excess of force and violence in executing the authority of the master, but rather an act beyond such authority, and foreign to the objects of the employment.

There was no evidence tending to show that Halpine had any charge of the portions of the depot not allotted for the purpose of checking baggage, neither did his employment imply any authority or control over the persons of passengers, or others,

who might be found there Nor is this the case of an act done from a wrong judgment in regard to a matter committed by the master to the discretion of the servant.

Another ground assumed is that the assault was an act of the servant, done in part execution of the contract of carriage between the plaintiff and the company. This is merely presenting the question in a different form, the principle being the same as that already referred to, namely: whether the act was done in the execution or performance of the service for which the servant was engaged. Whether the service to be rendered by the master is in the performance of a contract or in the discharge of any other duty resting on him, can, it is conceived, make no difference, the question being in either case, whether the act is within the scope of the servant's express or implied authority in respect to the master's service.

In order to withdraw the case from the operation of the general rule, and hold the company responsible, on the ground of its contract with the plaintiff as a passenger, it is necessary to maintain that the company, in requiring the plaintiff to apply to its servant for the purpose, and as the only means of getting his baggage checked, impliedly undertook to vouch for and warrant the good conduct of the servant toward the plaintiff while the two were engaged in transacting the business.

Whether this position is tenable we do not find it necessary in the decision of the case now before us, to express a definite opinion.

The case was not tried on this theory in the court below, nor has this phase of the question been argued here. But if any such rule of liability could be applied against the company, it would necessarily impose the reciprocal duty upon the plaintiff, to so demean himself toward the servant as not, by misbehavior, to provoke a personal quarrel between them. The evidence of the company on the trial tended strongly to prove that the plaintiff, by his importunate conduct and abusive language toward the servant, provoked a personal quarrel between them; that the assault was the result of this quarrel, and that the blow was inflicted by the servant as an act of personal resentment. If these facts had been found by the jury, the wrongful act of the servant in striking the plaintiff could not be regarded

as authorized by the master, nor as an act done by the servant in the execution of the service for which he was engaged by the master. The fact that the blow was inflicted with a hatchet furnished by the master, to be used for a wholly different purpose, though in connection with the servant's business, was wholly immaterial as respects the liability of the master. If he would not otherwise have been liable for the assault, the fact that it was committed with his hatchet did not contribute to make him so. The existence of the quarrel and its bearing upon the character of the assault, was not noticed in the charge. And if the jury found the quarrel to have been of the character which, as we have stated, the evidence tended to show it, they were not advised as to the influence it might properly have in enabling them to determine whether the assault was an act done in the course of the servant's employment, or was merely his own personal act.

It is true the charge stated the general rule correctly, but the difficulty encountered by the jury, as shown by the nature of the case and by the questions they propounded to the court, was to ascertain how to apply the general rule to the peculiar facts of the case in making up their verdict.

The reference made in the charge to the use for which the hatchet was provided, was calculated, we think, to make an erroneous impression on the jury on the very point on which their verdict hinged. And furthermore, the charge, from the generality of its terms, failed to give the jury the assistance they ought to have received, in view of the facts of the case. A charge, though not strictly objectionable in point of law, but which leaves the jury to draw an incorrect inference from facts in the case, material to the issue, will constitute good ground for a new trial, when it is reasonable to suppose, from a consideration of the whole evidence, that a different verdict would have been rendered if the jury had been fully instructed. The charge ought not only to be correct, but to be so adapted to the case and so explicit as not to be misconstrued or misunderstood by the jury in the application of the law, to the facts as they may find them from the evidence: Grah. & Water. on New Trials 774; 18 Maine 436; 30 Conn. 343.

Judgment reversed and cause remanded for a new trial.

Circuit Court of the United States, District of Virginia.

MATTER OF CHARLES H. WYNNE, BANKRUPT.

Debts secured by a deed of trust, made without fraud and without violation of any provision of the Bankrupt Act, are to be preferred in payment to the claims of general creditors in the distribution of the proceeds of the bankrupt estate by the assignee in bankruptcy.

Semble, that, though under the statute of the State a deed of trust takes effect as to creditors only from and after the recording thereof, such a deed will take effect from that time, though such recording be after the passage of the Bankrupt Act, if it be before the filing of the petition in bankruptcy.

It appears, from the Journal of the Senate of the United States, that the Bankrupt Act of March 2, 1867, was not in fact approved till Monday, the 4th of March; and this fact may be shown to support a deed recorded in the afternoon on the 2d of March, 1867; the validity of which is questioned upon the ground that it was not recorded until after the approval of the act.

The landlord in Virginia has a lien on property of the tenant, being and remaining upon the demised premises, for one year's rent accrued and to accrue, in preference to any mortgage, deed of trust, or judgment; and this lien is to be satisfied by the assignee in preference to such other liens as well as in preference to the claims of general creditors.

THE question in this case arose upon a petition of John Johns, Jr., assignee of Charles H. Wynne, an involuntary bankrupt, asking for instructions as to the order of payment of claims against the bankrupt estate. Wynne was adjudicated a bankrupt on the petition of Wheelwright, Mudge & Co., filed in the District Court of the United States for the District of Virginia on the 8th of June, 1867.

Enders, Paine, and Williams, claimed to be preferred in payment under a deed of trust dated August, 1866, which was never recorded; or, if that claim be disallowed, then under a deed of trust dated December 8, 1866, recorded March 2, 1867.

Haxall & Co also insisted on preference upon the ground that Wynne was tenant under them of the warehouse which he occupied, and that under the law of Virginia they as landlords had a lien for the rent due at the date of the petition, to enforce which, on the 10th of June, 1867, they sued out a distress warrant for $2,120, the amount of rent then due, and caused the same to be levied on the goods then on the premises; and subsequently, on the 18th of July, 1867, sued out an attachment, which was levied the same day upon the same

goods for $1,500, the amount of rent to become due on the 1st of December, 1867.

Opinion by

CHASE, C. J.—We will consider first the claim to preference in payment advanced in behalf of Enders, Paine, and Williams.

And we must say at once that so far as this claim is founded on the deed of August, 1866, it cannot be admitted. It is doubtless true that a mortgage or other conveyance made as security for a debt evidenced for a note or bond will operate as security for the same continuing debt, though the evidence of it be changed by renewal or otherwise: *Farmers' Bank* v. *Mutual Ins. Society*, 4 Leigh. 69. But in this case it is the security itself which has been changed, and not the evidence of the debt. The deed of December 8, 1866, was executed, as it seems, in substitution for that of August, which thereupon ceased to have any validity or effect.

The only question now to be determined is, therefore, whether or not the deed of December created a lien upon the property described in it, which the assignee of the bankrupt must satisfy before applying any of its proceeds to the claims of the general creditors. And it is to be observed that the deed is not condemned by the 35th section of the Bankrupt Act, which avoids all assignments and other modes of preference made or attempted by insolvents, or persons in contemplation of insolvency, within four months before the filing of the petition in bankruptcy, or in case the person to be benefited has notice of the intent within six months before such filing. The deed in question was not made within either limit of time. It need not, therefore, be here considered whether either period could begin to run till after the passage of the Act. If the deed is to be treated as void or inoperative as against the assignee by operation of the act, it must be because of the effect of that clause of the 14th section which provides "that all the property conveyed by the bankrupt in fraud of his creditors" "shall in virtue of the adjudication of bankruptcy and the appointment of the assignee be at once vested in such assignee."

We do not doubt that the assignee takes the property in the same plight in which it was held by the bankrupt when his

petition was filed—*Winsor* v. *McLellan*, 2 Sto. 495—subject to such liens or incumbrances as would affect it if no adjudication in bankruptcy had taken place; but it is to be remembered that the assignee represents the rights of creditors as well as the right of the bankrupt; and that any lien or incumbrance which would be void for fraud as against creditors if no petition had been filed or assignee appointed, will be equally void as against the general creditors represented by the assignee: *Bradshaw, assignee*, v. *Klein*, 7 Am. Law Reg., N. S. 505; *Carr* v. *Hilton*, 1 Cur. 230.

This is what the act means when it vests in the assignee "all property conveyed in fraud of creditors." It does not make any conveyance or incumbrance fraudulent. It simply clothes the assignee with the entire title, notwithstanding such conveyance or incumbrance, and makes it his duty to invoke the proper jurisdiction to annul the fraudulent proceedings.

And it may be remarked further that except to this extent the Bankrupt Act has no influence upon this case, so far as the deed of trust is concerned.

Much was said in argument concerning the effect of the record of this deed upon the 2d of March, 1867; and it was strenuously urged that the deed was avoided by the effect of the act which purports to have been approved on that day. But we entirely concur with Mr. Justice STORY in thinking that where the question is as to the effect of a proceeding instituted on the same day on which an act affecting the validity of such proceeding was passed the precise time at which the act became a law may be properly inquired into: *Matter of Richardson*, 2 Sto. 521. And in this we think ourselves warranted also by the reasoning of the Supreme Court. *Gardner v. Collector*, 6 Wall. 511.

Now, it is in proof that the deed of trust was recorded about 4 P. M. on the 2d day of March, 1867; and it appears from the Senate Journal of the session during which the act was passed that the day denominated the 2d day of March in the journal, and in the approval of the Statute by the President, consisted in fact of Saturday the second of March, of Sunday the third, and of Monday the fourth until noon; and it appears

further, that the bill which afterward became the bankrupt law was not enrolled and delivered to the proper committee to be presented to the President for his signature, until after the recess, which ended at 7:30 P. M. on Sunday, and was not reported to the Senate as actually signed by the President until after 9:40 A. M. on Monday: Senate Journal, 2 Sess, 39th Cong., 1866-7, pp. 432-458.

It cannot be doubted, then, that the deed of trust was, in fact, recorded nearly two days before the bankrupt bill became a law; and we think ourselves not only warranted on general principles, but bound by the Constitution, to notice the fact thus appearing upon the public records.

It may well be questioned, indeed, whether, if the act had been approved before the recording of the deed, the effect of the latter would have been altered. Nothing in the thirty-fifth section touches the deed; and nothing in any other, except the fourteenth. It may be, and we think it is, true that if the deed had remained unrecorded when the petition in bankruptcy was filed, the title of the assignee would have prevailed against any claim under the deed, for the assignee represents the creditors, and the statute of Virginia—Rev. Code, 1860, p. 566, § 5; see *Winsor* v. *Kendall*, 3 Sto. 515—expressly declares "any deed of trust void as to creditors," until and except from the time it is duly admitted to record. It is not an unreasonable construction of the Bankrupt Act, as we think, which regards it as vesting in the assignee for the benefit of creditors in general, the estate of the bankrupt discharged of liens or trusts, which, at the time of the petition, are invalid, *inter partes*, under the statute of the state in which they are claimed to exist. But we do not see how the mere enactment of the law could affect a deed previously executed.

It is not, however, necessary to consider these points here. The important question in the case is, whether under the fourteenth section of the bankrupt act this deed must be regarded as inoperative against the assignee? The counsel for the assignee has argued with much earnestness that the deed cannot be sustained without disregarding the implied effect of the first clause of the second general proviso of that section: "That no

mortgage of any vessel, or of any other goods and chattels made as security for any debt or debts in good faith and for present consideration, and otherwise valid and duly recorded pursuant to any statute of the United States, or of any State, shall be invalidated or affected hereby.

The argument is, that all mortgages not expressly saved from the operation of the act by this clause must be held invalid; and, therefore, that all deeds of trust and other conveyances intended as security for debts, and not within the description of the mortgages expressly saved, must also be invalid.

But we cannot adopt this reasoning. It would be going too far, we think, to hold all mortgages not included by the terms of the description to be invalidated by the act. The clause expressly saves certain mortgages, but it says nothing as to others. Much less does it say anything as to deeds of trust, or conveyances of analogous character. It leaves all deeds and instruments of writing not expressly saved to the general principles of jurisprudence. To hold otherwise, would, we think, be to give to the act an *ex post facto* operation contrary to the intent of Congress.

And it would be quite gratuitous so to hold; for all just rights of creditors as against instruments not described in this clause, are fully protected by that which stands next in the section and vests in the assignee for their benefit all the property conveyed by the bankrupt in fraud of his creditors.

The next question in this case, therefore, is, whether the deed of trust by which the several liabilities of Enders, Paine, and Williams, for Wynne were secured, was made in fraud of the creditors of Wynne.

It has been argued that the deed of trust took effect as against creditors only on the 2d day of March, 1867, and that the recording of the deed on that day was itself an act of bankruptcy. To maintain this proposition it is necessary to show that the recording of the deed was the act of Wynne. But clearly it was no act of his. The deed as against him was operative from its date. It was then that all his interest in the property described in it became vested by way of security in the trustee. It was then that he delivered the deed and parted

with all control of it. If the beneficiaries were satisfied with the security afforded by the deed unrecorded, there was neither necessity nor obligation to record it. To record it was only necessary to make it a valid security against other creditors; and it was not for Wynne, but for the creditors secured by the deed, to determine whether it should be recorded or not. The delivery of it for record was in no sense his act, but theirs. In no sense, therefore, can it be regarded as an act of bankruptcy.

But it has been argued that as against creditors it must be regarded as a deed executed at the date of the record, and therefore as a deed creating a preference on that day, which was within four months of the filing of the petition. There is ingenuity and apparent force in this argument. But we think there are decisive answers to it In the first place, the preference which the law condemns is a preference made within the limited time by the bankrupt, not a priority lawfully gained by creditors; and we have just shown that the preference gained by the record was not a preference made by the bankrupt. And, in the second place, the law which makes deeds of trust void "until and except from" the time of record clearly makes them valid at and from that time. And it is as much the policy of the Bankrupt Act to uphold liens and trusts when valid as it is to set them aside when invalid.

It is hardly necessary to add that this must be especially true of a trust deed created and recorded before the approval of the Bankrupt Act.

Was there any actual fraud in giving or taking the security created by the deed of trust? There has been no attempt to maintain this.

It has been said that Enders, Paine, and Williams, on the 8th of December, 1866, knew that Wynne was insolvent, but it is not denied that they had a right to obtain, if they could, preference in payment under the laws of Virginia. They could obtain it by direct transfer of property, or by deed of trust, or by judgment and execution. Until after the passage of the Bankrupt Act nothing but fraud in obtaining the preference, could invalidate it in whatever mode obtained.

It is not necessary to insist on this in the case before us, for

we do not think that the evidence establishes as matter of fact that at the date of the deed or at the date of the record Enders, Paine, and Williams were aware of the actual insolvency of Wynne. They knew, indeed, that he was embarrassed in carrying on his printing and publishing business, but they seem to have fully believed that his property was more than sufficient to pay all his debts.

On the whole, we are of the opinion that the deed of trust must be supported as a valid deed, and that the creditors named in it are entitled to be paid out of the proceeds of the property embraced in it.

The remaining question to be considered is, whether at the time of the filing of the petition in bankruptcy, Haxall & Co., had any lien for rent upon the property of the bankrupt.

This is the same property which was conveyed by the deed of trust, and the solution of the question just stated may be affected in some measure by the conclusion to which we have come in respect to the validity of the lien created by that deed.

And in considering the question now to be disposed of, we may lay out of view the proceeding by distress warrant and also the proceeding by attachment. As we understand the Bankrupt Act, all the rights and all the duties of the bankrupt in respect to whatever property, not expressly excluded from the operation of the act, he may hold under whatever title, whether legal or equitable, and however encumbered, pass to and devolve upon the assignee at the date of the filing of the petition in bankruptcy. And all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced by any proceeding in a State court, commenced after petition is filed, though in cases where jurisdiction has been previously acquired by State courts of a suit brought in good faith to enforce a valid lien upon property, such jurisdiction will not be divested: *Peck* v. *Jenness*, 7 How. 612.

Whether, therefore, the distress warrant or the attachment be regarded as a proceeding for obtaining or enforcing a lien, each was equally unwarranted—*Buckey* v. *Shouffer*, 10 Md

Rep. 149—and the restraining order as to both was properly issued: 1 Bank. Reg. Suppt. xi. If a lien for rent existed it was a lien to be discharged by the assignee, and enforced in the United States Court of Bankruptcy. If it did not exist it could not be brought into existence by any proceeding whatever.

The real question is, Were the goods on the premises demised to the bankrupt subject to a lien for rent under the State law when the petition was filed, independently of any proceeding by distress or attachment?

Liens are of various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives the creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. And we think that a lien of this sort is given by the 12th section of title 41, chapter 138 of the revised Code of Virginia, adopted in 1860. It expressly prohibits any person having, by deed or trust, mortgage or otherwise, a lien upon goods of a tenant on demised premises from removing such goods without paying to the landlord the rent due and securing the rent becoming due, not exceeding altogether one year's rent; and it further requires any officer who may take such goods under legal process to pay out of the proceeds the rent in arrear and deliver to the landlord sufficient purchasers' bonds for the payment of that becoming due. We cannot doubt t at this statute creates a lien in favor of the landlord, and a lien of a high and peculiar character. We have no concern with the policy of this legislation; it is upon the statute-book, and the lien it creates must be respected and enforced.

The validity of the deed of trust in this case seems to us clear, and it is not doubted by any one that in the absence of the special circumstances supposed to affect it with invalidity the lien of the creditors secured by it would be perfect. But these creditors, by no process whatever, could appropriate these goods to the satisfaction of their debts without paying or securing the year's rent; and so of process under execution. The officer of the law, at his peril, must pay the rent out of the proceeds.